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IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

NO. 78-1325

JOHN OWEN TYLER,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF GEORGIA**

RESPONDENT'S BRIEF IN OPPOSITION

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ON PETITION FOR WRIT OF CERTIORARI
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BRIEF IN OPPOSITION FOR THE RESPONDENT

QUESTIONS PRESENTED

1.

Did the Court of Appeals of Georgia properly
refuse to review the issue of the application of
the Wagering Tax Act to State's Exhibit No. 37?

2.

Was State's Exhibit No. 37 excludable under 26
U.S.C. § 4424(c)?

STATEMENT OF THE CASE

Petitioner, John Owen Tyler, was indicted by the grand jury of Fulton County, Georgia, on February 20, 1976, and was charged with the offense of communicating gambling information, a violation of Ga. Code § 26-2706. The indictment was one of seven returned the same day as the culmination of a five-month investigation of organized bookmaking in the metropolitan Atlanta area. Petitioner entered a plea of not guilty. (R. 4, 5).

The bulk of Respondent's case against Petitioner consisted of evidence seized as a result of both a court-authorized electronic surveillance and the execution of a search warrant for Petitioner's residence. Petitioner moved to suppress all such evidence (R. 8-17), and a hearing was held in the Superior Court of Fulton County commencing on June 2, 1976.^{1/} At the close of the hearing, and before considering briefs filed, Judge Sam Phillips McKenzie ruled:

After hearing argument and considering the evidence in the above-captioned case, Defendant John Owen Tyler's Motion to Suppress as Amended is hereby denied, except as to the tax stamp, the tax returns, and other items required to be suppressed under 26 U.S.C. § 4424(c).

(R. 31).

^{1/} The transcript of the hearing on the motion to suppress will be referred to as "M.T."

Subsequently, between June 10 and June 15, Petitioner was tried before Judge McKenzie and a jury. The jury required only 45 minutes deliberation to convict Petitioner, and the Court imposed a sentence of five years and a fine of \$5,000.00. (R. 53, 58; T. 634-38, 650).

During the trial, it was proved that Petitioner and his son operated Tyler Sporting Events Service from Petitioner's home located in Conyers, Rockdale County, Georgia. (T. 115, 116, 488-89, 685-86). The firm had four telephones working conjunctively during the fall of 1975 and January, 1976. On February 26, 1976, three of the lines were suspended. (T. 115-17, 685). During December, 1975, Petitioner had conversations with others over the telephone listed to Tyler Sporting Events Service, during which he placed and accepted bets and imparted betting information. (T. 330-420). The tape of each call was played for the jury, the voice of each person was identified, and the content was analyzed by a duly-qualified expert.

Among the documents tendered by the Respondent was State's Exhibit No. 37, a special notebook which was located near a telephone at the Conyers address for Tyler Sporting Events Service. (T. 264, 297).^{2/} This document is the basis of Petitioner's case before this Court.

Petitioner's conviction was affirmed by the Georgia Court of Appeals on September 12, 1978. Tyler v. State, 147 Ga. App. 394, 249 S.E. 2d 109 (1978). The Supreme Court of Georgia denied a petition for a writ of certiorari on November 30, 1978.

^{2/} State's Exhibit No. 37 is found at pages 706-10 of the transcript and will be thoroughly described subsequently.

Further facts will be discussed as necessary for a more thorough illumination of the issues raised by the present petition.

REASONS FOR NOT GRANTING THE WRIT

A. THE COURT OF APPEALS OF GEORGIA PROPERLY REFUSED TO REVIEW THE QUESTION RAISED BY PETITIONER ON AN ADEQUATE AND INDEPENDENT STATE GROUND.

Petitioner alleges that the trial court in the case at bar improperly admitted evidence of federal wagering tax payments. The documents to which Petitioner objects at this time are found in State's Exhibit No. 37, consisting of four pages from a special notebook found near the telephone in the gameroom of Petitioner's home. At the hearing on Petitioner's motion to suppress, Petitioner objected to the admission of any testimony regarding a wagering tax stamp. (M.T. 495). Petitioner further asserted that his rights under the Fifth Amendment were violated by the seizure of the tax stamp issued by the Internal Revenue Service. (M.T. 618). Subsequently, counsel stated that the objection was to the search warrant of the Tyler home, only as it pertained to the seizure of the wagering tax stamp. (M.T. 620).

At trial, when the State offered State's Exhibit No. 37, which contains the records in question, Petitioner's counsel objected to its introduction, stating "same objection" referring to his continuing objection. (T. 424). The continuing objection was stated early in the trial by the court: ". . . this is a continuing objection as to any testimony that derives from the Walton County electronic surveillance. I'll let that be a continuing objection without the necessity of stating it." (T. 148). The desire was to preserve the objection raised in the

Motion to Suppress the electronic surveillance. (T. 149-50). There was no mention of the federal statute as a basis for the objection. The trial court admitted the exhibit over the continuing objection. The Court of Appeals of Georgia held that the question of whether the records came within the Wagering Tax Act, specifically 26 U.S.C. § 4424(c), could not be considered by that court, as the objection urged on appeal was not the same objection urged at trial. Tyler v. State, 147 Ga. App. 394, 249 S.E. 2d 109 (1978).

It is well-settled law in Georgia that an objection must be presented to the trial court for a ruling; otherwise, nothing is presented for review by the appellate courts. Patterson v. State, 228 Ga. 389, 390, 185 S.E. 2d 762 (1971). The Georgia Supreme Court has held on numerous occasions that even though a ground for objection to evidence existed which would have been good if made at the appropriate time,

. . . if the objection made be not good or not made at all or made for the first time in the motion for a new trial or made only before this court, the Supreme Court [of Georgia] being a court alone for the trial and correction of errors of law committed in the trial court, will not set aside the verdict and judgment of conviction on account of the admission of such evidence.

Starr v. State, 229 Ga. 181, 183, 190 S.E. 2d 58 (1972);
Salem v. State, 228 Ga. 186, 184 S.E. 2d 650 (1971);
House v. State, 227 Ga. 257, 181 S.E. 2d 31 (1971);
Hart v. State, 227 Ga. 171, 179 S.E. 2d 346 (1971);
Edwards v. State, 224 Ga. 648, 164 S.E. 2d 120 (1968). Thus, it is apparent that the Georgia courts in the case at bar applied a well-established procedural rule, thereby barring review of the issue raised by the Petitioner.

The Supreme Court of the United States has declined to review state court judgments based on adequate and independent state grounds, as long as there is no discrimination merely because a federal question is involved. Henry v. Mississippi, 379 U.S. 443 (1965); Herb v. Pitcairn, 324 U.S. 117, 118 (1944). Procedural defects in state proceedings may serve as a sufficient state ground, if the state's insistence on compliance with the rules serves a legitimate state interest. Henry v. Mississippi, 379 U.S. at 448.

The Georgia rule requiring an objection to be made at trial serves a legitimate state interest. The rule gives the opportunity to conduct the trial without using possibly tainted evidence and may avoid a new trial. This gives the trial court a chance to correct any errors as they occur, rather than having the issue decided by an appellate court on a cold record. Thus, the rule serves the state's interest as well as the defendant's interest in avoiding delay and wasting time in the disposition of the case. See Henry v. Mississippi, 379 U.S. at 448.

The Georgia Court of Appeals properly declined to review the issue of the application of the Wagering Tax Act based on an adequate and independent state ground. Therefore, Respondent submits that this Court, like the Georgia appellate courts, should decline to review Petitioner's case.

B. STATE'S EXHIBIT NO. 37 WAS
NOT EXCLUDABLE UNDER 26 U.S.C.
§ 4424(c).

Petitioner asks this Court to assume without the benefit of any argument that 26 U.S.C. § 4424(c) precluded Respondent's use at trial of State's Exhibit No. 37. Respondent argues that this assumption is unwarranted.

The documents to which Petitioner objects, State's Exhibit No. 37, consist of four pages from a special notebook found near the telephone in the gameroom of Petitioner's home. (T. 297). Each page is headed with a notation showing the month and year from September to December, 1975. Each page contains two columns with the first column reflecting the day of the week and the date, and the second column containing a list of amounts corresponding to the days in column one. Each page, except the last, contains a total of the amounts contained in column two and the notation "2% Tax" followed by a figure. (T. 706-10).

Review of the trial transcript shows that these records are not those of Petitioner, but those of Petitioner's son, Frank Owen Tyler. (T. 487). After being called as a witness by the Petitioner, Frank Tyler testified that he was a gambler who worked and lived in his father's [Petitioner's] house. (T. 488, 529). Frank Tyler testified that he had a "special license" issued by the federal government, and that State's Exhibit No. 37 was a book containing payments which he [Frank Owen Tyler] made in connection with that license. (T. 489-90).

Thereafter, at the request of Petitioner's trial counsel, Frank Tyler provided handwriting exemplars, marked as Defendant's Exhibits 8 through 11, which were compared to State's Exhibit No. 37 by a handwriting expert who testified that the same person prepared both sets of documents. (T. 742-45, 523). Thus,

Petitioner proved at trial that the records in State's Exhibit No. 37 did not belong to Petitioner, but that Petitioner's son who is living in Petitioner's house, was a "licensed" gambler, who paid tax to the federal government, and that the records in question belong to Frank Tyler.

Based on these factual considerations, Respondent argues that 26 U.S.C. § 4424(c) did not preclude the use of State's Exhibit No. 37. This code section requires suppression in a civil or criminal case against the taxpayer only of records belonging to that taxpayer. This construction of the statute is required by the plain language of the statute itself and the history of the statute. This section was enacted in response to the decisions by this Court in Marchetti v. United States, 390 U.S. 39 (1968) and Grosso v. United States, 390 U.S. 62 (1968). In Grosso and Marchetti, this Court held that a gambler could invoke the Fifth Amendment privilege in a federal prosecution for failure to register, report or pay the excise tax levied on wagers.

The registration and reporting requirements of the wagering tax provision, as they stood until 1974, created a "real and appreciable" danger of self-incrimination, since the Internal Revenue Service was not precluded from making available to the public the information provided by the gambler. This Court refused to preempt Congress in seeking a resolution of the problem.

In 1974, Congress legislatively granted immunity to a taxpayer who registered, received a tax stamp, filed wagering tax returns and paid his taxes in accordance with 26 U.S.C. § 4401. Sections 4424(b) and (c) create a use and derivative use immunity for all records in the possession of the taxpayer in a prosecution for other than the enforcement of the tax liability. United States v. O'Brien, 420 F. Supp. 834 (D. Conn. 1976), aff'd, 555 F. 2d 136 (2d Cir. 1977).

When granted, immunity is designed to replace the Fifth Amendment privilege, and need be no broader than the protection afforded by that privilege. Counselman v. Hitchcock, 142 U.S. 547, 585 (1892).

Frank Tyler could not be compelled to give testimony against himself by any court or prosecutor, nor could he be compelled by way of the wagering tax to give incriminatory information against himself. However, Frank Tyler could be compelled through a grant of use immunity, to testify against his father and that information could be used against Petitioner. Ga. Code Ann. § 38-1715; 18 U.S.C. § 6001, et seq.

Furthermore, the only documents precluded by 26 U.S.C. § 4424(c) are the "stamp denoting payment of the special tax" and the "original copy or abstract . . . of any return, payment or registration. . . ." 26 U.S.C. § 4424(c)(1), (2). Respondent submits that State's Exhibit No. 37 does not come within this provision. It is also clear than the document itself was not acquired by the improper use of any document excludable under the code. See 26 U.S.C. § 4424(c)(3). At the conclusion of the electronic surveillance conducted in compliance with 18 U.S.C. § 2510, et seq., and Ga. Code § 26-3004,^{3/} a search warrant was issued authorizing the search of Petitioner's home. (T. 256, 257, 700-05; M.T. 491, 536-38, 937). Various items were found, including the special notebook, telephone bills, a football schedule, legal pads, an ash can containing burned paper and a line sheet. (T. 264, 265, 700). Additionally, a gambling tax stamp was recovered inside State's Exhibit No. 37. (M.T. 495). However, upon Petitioner's objection, the stamp itself was excluded. (M.T. 496). State's Exhibit No. 37 was not derived from the improper use of that stamp, in fact, the stamp was found inside the exhibit after the notebook had been seized.

^{3/}See Morrow v. State, 147 Ga. App. 395, 249 S.E. 2d 110 (1978).

It is clear that the records in the present case are not a copy of any return, payment or registration as specifically set out in the act. Respondent also submits that the records do not constitute an abstract as defined by the code section. Although an abstract as used in this context is not defined in the Internal Revenue Code, the term generally refers to an abridgment or synopsis of a larger work, which, in its abridged or synopsis form, shows all the important matters shown in the larger work. See Harding v. Bedoll, 202 Mo. 625, 100 S.W. 638 (1907). State's Exhibit No. 37 did not contain all of the important facts contained in either a return, payment or registration.

A consideration of the record requirements of the wagering tax provisions of the Internal Revenue Code, 26 U.S.C. § 4401, et seq., will compel this Court to conclude that State's Exhibit No. 37 is the record required by 26 U.S.C. § 4403: "Each person liable for tax under this subchapter shall keep a daily record showing the gross amount of all wagers on which he is liable, in addition to all other records required pursuant to section 6001(a)." It is unlikely that Congress would employ the language found in § 4424(c)(2) when a reference to 26 U.S.C. § 4403 would have sufficed had the intent been to include the records required by that provision in the exclusions set out in § 4424(c)(2).

Congress made 26 U.S.C. § 4424(a) and (b) all-inclusive with regard to documents provided to the Internal Revenue Service by the taxpayer. However, "the amendment provides that certain documents related to the wagering taxes, and information obtained through such documents, may not be used against the taxpayer in any criminal proceeding. . . ." 1974 U.S. Code Cong. and Adm. News, 6228, 6233. [Emphasis added]. Thus, § 4424(c) is limited to certain documents specified in the subsection. This registration scheme is aimed at an "inherently suspect group" in an area "permeated with criminal statutes." One primary objective is to flush out the individuals involved in the illegal conduct for prosecution. United States v. Parente, 449 F. Supp. 905, 910-11 (D. Conn. 1978). This prosecutorial

interest is far more important than the interest in producing revenue. If the reverse were the case, Congress would not have simultaneously reduced the tax rate from ten percent to two percent.

If U.S.C. § 4424(c) is as all inclusive as Petitioner apparently assumes, Congress has seriously handicapped gambling prosecution in both federal and state courts. Any memoranda found in connection with a registered gambler would be subject to a claim that it is required by the government and, thus subject to suppression. Respondent argues that Congress never envisioned such a result and the scope of the items found in the taxpayers' possession which must be suppressed is restricted.

Thus, State's Exhibit No. 37 was not suppressable under 26 U.S.C. § 4424(c) and there is no merit to this issue raised in the petition for a writ of certiorari.

CONCLUSION

For the above and foregoing reasons, Respondent respectively requests this Court to deny the petition for writ of certiorari filed on behalf of John Owen Tyler.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Don A. Langham, Attorney for the Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent upon the Petitioner by depositing three copies of same in the United States mail, with proper address and adequate postage to:

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This 11th day of May, 1979.

Don A. Langham
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